U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: January 26, 1999

Case No.: 1996-INA-0325

In the Matter of:

BEST TRAVEL,
Employer

On Behalf Of:

MIRIAM ELHIANY,
Alien

Certifying Officer: Dolores DeHaan, Region II

Appearance: Earl S. David
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 18, 1994 Best Travel ("Employer") filed an application for alien labor certification to enable Miriam Elhiany ("Alien") to fill the position of Executive Secretary (AF 4-7). The job duties for the position are:

> Schedules appointments, gives information to callers, takes dictation and otherwise relieves officials of clerical work and minor administrative. Answer telephone and give information to callers. Schedules appointments for employer. Greets visitors, conducts visitors to employer or appropriate person. Prepares notes, correspondence, and reports, using word processor or computer terminal.

The requirements for the position are fluency in both Hebrew and French, and two years experience. (AF 7).

The CO issued a Notice of Findings on October 26, 1995 (AF 42-45), proposing to deny certification on three grounds: Employer's foreign languages requirement is not justified as a business necessity; Employer failed to recruit U.S. workers in good faith; and, Employer failed to state a lawful, job-related reason for rejecting U.S. workers.

The CO stated that Employer could rebut the proposed finding that the foreign languages requirement was not justified as a business necessity "by: a. deleting the Hebrew and French language requirement; or b. submitting evidence that the requirement for foreign language ability arises from a business necessity rather than employer convenience." (AF 44). In order to demonstrate business necessity, the CO directed Employer to document the following:

1. The total number of clients/people he deals with and the percentage of those people he deals with who cannot communicate in English.
2. The percentage of his business that is dependent upon each of the languages.
3. How absence of each the languages would adversely impact business.
4. The percentage of time worker would use each of the languages.
5. Describe how employer has dealt with and handled French and Hebrew speaking clients previously or is currently handling this segment of his business.
6. Describe services provided by employer to other ethnic groups and how the language problem is handled.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

7. Any other documentation which will clearly show that fluency in French and Hebrew is essential to employer's business.

(AF 44).

The CO stated that Employer could rebut the proposed finding of a lack of good faith recruitment by documenting all contact with Ms. Jaclyn Pindik, a U.S. worker who was possibly qualified. (AF 43). The CO directed Employer to provide all details of that contact, including copies of any correspondence, certified mail receipts, and phone bills. (AF 43).

Finally, the CO directed Employer to document a lawful, job-related reason for rejecting Ms. Pindik. (AF 42).

Accordingly, Employer was notified that it had until November 30, 1995, to rebut the findings or to cure the defects noted. On November 24, 1995 Employer requested an extension of the period in which it could rebut the NOF. (AF 51). On November 30, 1995 the CO granted Employer's request and notified Employer that it had until January 2, 1996 to rebut the findings or to cure the defects noted. (AF 53).

In its rebuttal, dated January 2, 1996 (AF 54-69), Employer contended that the foreign languages requirement was a business necessity, it made a good faith effort recruitment effort, and Ms. Pindik was rejected for lawful, job-related reasons.

Employer chose to document the business necessity of the foreign languages requirement rather than withdraw it. As evidence, Employer stated that it handles approximately 50 customers per week. (AF 69). Roughly 25% of those customers speak Hebrew and roughly 15% speak French. (AF 69). The worker hired into this position will spend approximately 25% and 15% of the time communicating in Hebrew and French, respectively. (AF 69). The previous holder of the position spoke both Hebrew and French. (AF 69). Employer is '[c]urrently handling this segment [of its business] with difficulty." (AF 69).

Employer documented both its recruitment efforts and its rationale for rejecting Ms. Pindik by stating that it made "numerous and futile requests to reach her," but that "she was unresponsive." (AF 69). Employer's attempts to contact Ms. Pindik included a letter[2] sent on April 6, 1995 and five phone messages left between March 29, 1995 and April 19, 1995. (AF 69). Employer noted that Ms. Pindik's failure to respond in a timely manner indicates that she "is ill suited to" Employer's needs and was rejected on "valid job-related grounds." (AF 69).

The CO issued the Final Determination on January 25, 1996 (AF 70-72), denying certification on three grounds: the foreign languages requirement is not justified as a business necessity; Employer failed to recruit U.S. workers in good faith; and, Employer failed to state a lawful, job-related reason for rejecting U.S. workers.

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[2] The Appeal File does not contain a copy of this letter, which is referred to by both Employer and the CO. However, in its request for review of the denial of its application, Employer states that the letter was not certified. The absence of the letter from the Appeal File, therefore, did not affect the outcome of this decision.

The CO noted that although Employer had partially documented the business necessity of the foreign languages requirement, it failed "to document the number of customers ... who cannot communicate in English." (AF 71). Employer also failed to provide "specific information on how [the] absence of each of the languages would adversely impact business." (AF 71). Thus, "Employer failed to document that the job opportunity containing a foreign language requirement [is] supported by evidence of business necessity...." (AF 71).

The CO noted that Employer ignored her directive to provide certified mail receipts as documentation of its good faith recruitment of U.S. workers. (AF 70). Because Employer's efforts to contact U.S. workers consisted of leaving phone messages and sending non-certified letters, the CO has "no way of knowing if the applicant received the reported messages." (AF 70). The CO concluded that "Employer failed to document ... good faith recruitment." (AF 70).

On February 12, 1996 Employer requested review of the Denial of Labor Certification (AF 76). The CO forwarded the record to the Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The issues are whether the foreign languages requirement is unduly restrictive and Employer recruited U.S. workers in good faith.

A job opportunity shall not include a requirement for a language other than English unless that requirement arises from business necessity. 20 C.F.R. 656.21(b)(2)(i)(c). Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates, Inc*., 91-INA-72 (Feb. 3, 1993).

An employer must demonstrate that a required foreign language is essential to the performance of the job's duties. *Hudson Development & Construction Corp*., 91-INA-33 (Feb. 15, 1993). In the present case, as in *Hudson*, Employer failed to respond to the CO's instructions to provide evidence of the percentage of its clients who can communicate in the required foreign language but not in English. Employer responded to the CO's request for documentation on how the absence of the foreign language would adversely impact employer's business solely by stating that it is "[c]urrently handling this segment with difficulty." (AF 69). In the present case, as in *Hudson*, Employer has failed to adequately document that its foreign language requirement arises from business necessity and labor certification was properly denied on that ground.

As to the failure to recruit U.S. workers in good faith, the Employer has wholly failed to document its contacts with applicant Piudik. An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

It is well established that in order to establish good-faith recruitment, an Employer has an obligation to try alternative means of contact. *Yaron Development Co., Inc.*, 89-INA-178 (Apr. 19, 1991) (*en banc*). See also, *L.G. Manufacturing, Inc.*, 90-INA-586 (Feb. 5, 1992). See also, *Ceylion Shipping, Inc.*, 92-INA-322 (Aug. 30, 1993); *Roma Ornamental Iron Works, Inc.*, 92-INA-394 (Aug. 26, 1993); *Delmonico Hotel Co.*, 92-INA-324 (July 20, 1993); *Gilliar Pharmacy*, 92-INA-3 (June 30, 1993) (made only unanswered phone calls; no letters mailed); *Surrey Transportation, Inc.*, 92-INA-241 (June 2, 1993); *William Martin*, 92-INA-249 (June 2, 1993); *Allcity Auto Repairs*, 91-INA-8 (Mar. 24, 1993) (left only an unanswered message); *Warmington Homes*, 91-INA-237 (Mar. 22, 1993); *Wells Laboratories, Inc.*, 92-INA-162 (Mar. 12, 1993); *Almond Jewelers, Inc.*, 92-INA-48 (Mar. 8, 1993); *Fragale Baking Co.*, 92-INA-64, 65 (Feb. 23, 1993); *MVP Corp.*, 92-INA-58 (Feb. 1, 1993).

The employer has not established a good faith effort to recruit where it does no more than make unanswered phone calls where an applicant's address is in the record. Under these circumstances a certified letter would have been a minimally acceptable effort.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the

petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.